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contractual in nature, to restore the value of the assets embezzled.¹⁸ Trusts involve some of the elements of contract but are of a more transcendent character and include so much more that they may not be reduced to the ordinary elements of contract.

Granted then that the obligation to make good upon a breach of trust is a claim provable in bankruptcy on a par with those of other creditors, it seems to be a logical conclusion that a voluntary transfer to carry out this obligation is within the confines of "voidable preferences," although the transaction does appear at first glance to be outside of the usual contemplation and general purposes of statutes in bankruptcy.

S. L. H.

BOOK ENTRIES.—The case of *West Virginia Architects and Builders v. Stewart*,¹ held that books of original entry of a contractor and builder kept by a bookkeeper, who, according to an established system or method of transacting the business, records the oral or written reports made to him by one or more persons in the regular course of business, of transactions lying in the personal knowledge of the latter, whether such bookkeeper have personal knowledge of such transaction or not, are admissible in evidence in connection with the testimony of such bookkeeper showing the regularity of the entries therein by him, to prove an account therein, without the evidence of the witnesses having personal knowledge of the transactions, provided the testimony of such witnesses, because of death, interest, incompetency, absence, inconvenience or otherwise be unavailing.

The general rule requires that the entrant must have had personal knowledge of the transaction.² Though recognizing its existence, and citing a great many cases which follow it, the Court, relying chiefly on Professor Wigmore's exception, qualifies the rule.

The general principle of testimonial evidence is, that the person whose statement is received as testimony should speak from personal observation or knowledge. This principle does not, however, necessarily exclude all entries made by persons not having personal knowledge of the facts entered. If the element of personal knowledge can somehow be adequately supplied by a third person, it is immaterial that the entrant himself did not have this personal knowledge. Professor Wigmore gives three possible situations:

¹⁸ Perry on Trusts, 6th Ed. § 843.
Dornford v. Dornford, 12 Vesey 127.
Moons v. De Bernales, 1 Russ. 301.
Smith v. Frost, 70 N. Y. 65.
Snyder v. Parmalee, 80 Vt. 496.
Holderman v. Hood, 70 Kans. 267.

¹ 70 S. E. 113 (1911).

² *Vinal v. Gilman*, 21 W. Va. 301.

(1) If the entrant be deceased, and the actor in the transaction swears to the correctness of his original memorandum or oral report the element of personal knowledge is sufficiently supplied, and the entry is admissible if made in the regular course of business.

(2) If the transactor be deceased, but the entrant swear to the entry as correctly representing the memorandum or oral report, such entry, if based on a memorandum, would be sufficient, as supplying the element of the transactor's personal knowledge, if made in the regular course of business, its production being impossible by destruction, and the transactor being unavailable by decease.

(3) If both entrant and transactor be deceased, the entry is admissible.

A possible fourth case is where the transactor is unavailable. The result need not be different: the rule being, that where an entry is made by one person in the regular course of business, recording an oral or written report, made to him by one or more other persons in the regular course of business, of a transaction lying in the personal knowledge of the latter, there is no objection to receiving that entry, provided the practical inconvenience of producing on the stand the numerous persons thus concerned would in the particular case outweigh the probable utility of doing so.

The rulings on the subject may be classified:

(a) Cases admitting verified regular entries without requiring the original observer having personal knowledge to be produced or accounted for.

(b) Cases admitting verified regular entries after a showing that the original observer was deceased; possibly absence from the jurisdiction, insanity, or the like, would equally have sufficed.

(c) Cases excluding such entries because the original observer was in no way accounted for, or declaring that he must be produced, without deciding what excuse, if any, for non-production would suffice.

(d) A few rulings inexorably exclude such entries even where the original observer is accounted for as absent from the jurisdiction, or the like.^a

The following cases seem to require the presence of the original observer:

The *Norma*,⁴ held that a bill of particulars containing numerous items of work and materials may be proved, after destruction of the original memoranda, from which the account was made up, by the evidence of the bookkeeper that he correctly transcribed the memoranda and the testimony of the persons who made and furnished the memoranda to him that the same were correct; but the proof is insufficient where it consists only of the bookkeeper's testimony as to the correctness of his transcription.

^a Wigmore: Evidence, §1530.

⁴ 68 Fed. 509 (1905).

Stidger v. McPhee,⁵ decided that evidence that the custom of a store was not to make an entry of sales until the goods were delivered, and that a salesman brought the witness a slip showing the sale of the goods in question, and the date of their delivery, and that thereon he made an entry in the daybook, and that making the slip and delivery were concurrent acts, is insufficient to sustain the admission of the daybook to show delivery at such time, the salesman not being produced.

Miller v. Shay,⁶ held that if goods are delivered by a servant, and his entries or marks are transferred to the master's account book, the servant is a competent and necessary witness to support the charges and to prove the delivery.

Taylor-Woolfender Co. v. Atkinson,⁷ laid down the rule that where, in an action to recover for goods sold, the plaintiff showed that the entries in its ledger were made from slips, made out in duplicate by the clerks who made the sales and one of them sent to the bundle counter and the other to the bookkeeper, it was necessary for the plaintiff to prove, to the satisfaction of the jury, that no entry was made except from slips, that no such slips were sent to the bookkeeper except when the goods, accompanied by a duplicate slip, were sent to the bundle counter, and that all goods sent to the bundle counter were delivered, to make the ledger admissible in evidence.

In *Mayor of N. Y. v. Second Ave. Ry. Co.*⁸ it was sought to prove the number of day's labor in making certain repairs by a time book, kept by one Wilt made up from reports of the foreman. It was held that the time book was inadmissible upon the testimony of either the foreman, or of Wilt, separately considered. "But combining the testimony of Wilt and the gang foreman, there was, first, original evidence that laborers were employed, and that their time was correctly reported by persons who had personal knowledge of the facts, and that their reports were made in the ordinary course of business, and in accordance with the duty of the persons making them, and in point of time were contemporaneous with the transactions to which the reports related; and, second, evidence by the person who received the reports, that he correctly entered them as reported, in the time book, in the usual course of business and duty."

The following cases are in favor of the rule in the case under discussion:

Lawrence v. Stiles,⁹ held that the original entries in a book of account are competent evidence if the person making them testifies that the entries therein made are correct even though it appears that

⁵ 15 Colo. App. 252 (1900).

⁶ 145 Mass. 162 (1887).

⁷ 127 Mich. 633 (1901).

⁸ 102 N. Y. 572 (1886).

⁹ 16 Ill. App. 489.

he has no recollection of the transaction, independently of the book entries.

Chisholm v. Beaman Machine Co.,¹⁰ stands for the proposition that books of account showing entries for time for workmen are admissible in evidence against a party who was to pay the expense of such work, though such entries were made the day after the work was done, from time slips made by the workmen and marked "approved" by the foremen, who testify to their correctness, while the men who made the entries on the books testify the slips were correctly copied.

Though these and similar cases¹¹ may possibly be distinguished from *West Virginia Architects and Builders v. Stewart*, the same principle of necessity and inconvenience amounting to practical impossibility of producing the original observers runs through them all. And it seems that even where, because of the survival of some archaic rule excluding the plaintiffs in the *West Virginia* case from testifying on the ground of interest, that such subdivision of "inconvenience" should not throw out the books.

T. W. B., 3rd.

¹⁰ 160 Ill. 101 (1896).

¹¹ *Little Rock Granite Co. v. Dallas County*, 66 Fed. 522; *Redlich v. Banerlee*, 98 Ill. 134.